No. 85-1142

Supreme Court, U.S.
FILED
MAR 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MANUFACTURERS HANOVER TRUST COMPANY,
AS EXECUTOR OF THE ESTATE OF
CHARLOTTE C. WALLACE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

	Page
ARGUMENT	2
1. The Government Has Offered No Support For Its Conclusory Argument That Accuracy Is An Important Governmental Objective	2
2. The Requirement That The Gender-Based Discrimination Must Satisfy The Relationship Standard Has Not Been Met	4
3. The Use of Gender-Based Tables Makes The Sterotypical Assumption That Women Do Not Work In The "Man's World"	4
4. The Impact on Female Or Male Beneficiaries Is Irrelevant	5
5. The Use of Gender-Based Tables Is Not Compatible With Congressional Intent	6
6. The Government Ignores The Court Of Appeals' Holding That The Discrimination Must Be Intentional	7
7. The Government's Argument On *Manhart* And *Norris* Is Unavailing	7
8. The Government, By Its Unilateral Action Of Adopting New Regulations, Cannot Undercut The Rights of Petitioner That Have Already Been Asserted In Pending Litigation	8
CONCLUSION	9

TABLE OF AUTHORITIES

	Page
Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983)	7
City of Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978)	7
Craig v. Boren, 429 U.S. 190 (1976)	3,4
Estate of Dwight B. Roy, Jr., 54 T.C. 1317 (1970)	6
Estate of Henrietta Allen v. United States, 558 F.2d 14 (Ct. Cl. 1977)	6
Frontiero v. Richardson, 411 U.S. 677 (1973)	3
Hall v. United States, 353 F.2d 500 (7th Cir. 1965)	6
Michael M. v. Sonoma County Superior Court, 450 U.S. 464 (1981)	4,5
Mississippi University for Women v. Hogan, 458 U.S. 718 (1982)	3
Reed v. Reed, 404 U.S. 71 (1971)	3
Robinson v. United States, 454 F. Supp. 1160 (N.D. Cal. 1978), *aff'd*, 632 F.2d 822 (9th Cir. 1980)	6
Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)	3

STATUTES AND REGULATIONS

Internal Revenue Code §2037 (26 U.S.C. §2037)	4
Rev. Rul. 66-307, 1966-2 C.B. 429	6

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REPLY BRIEF

Petitioner submits this reply brief in support of its Petition for Writ of Certiorari. The Court is respectfully referred to the Petition For Writ of Certiorari and petitioner's appendix for a fuller statement of petitioner's position. The Court is also referred to Judge Newman's dissenting opinion below and to the District Court opinion which correctly find that the use of gender-based actuarial tables in this case is unconstitutional. (A 21-A 37 and A 38-A 48, respectively.)

ARGUMENT

1. *The Government Has Offered No Support For Its Conclusory Argument That Accuracy Is An Important Governmental Objective*

The government's Brief in Opposition ("Brief In Opp.") returns again to the theme that some purported greater accuracy is achieved by the use of gender based tables and that this purported accuracy is an important governmental objective which justifies the admitted gender discrimination here. (Brief in Opp. at 6.) The government, however, has not offered, and the Court of Appeals did not cite, any support for the conclusory statement that accuracy is an important governmental objective. Accuracy, in fact, is not achieved by the use of gender-based tables since gender-based tables are inaccurate more than 80% of the time. (A 17, A 34-A 35, A 45) Furthermore, it makes no sense to argue that the use of sex-based tables is more accurate when the valuation of decedent's reversionary interest is based on the fiction (i.e., the basic inaccuracy) that Mrs. Wallace might survive her son and when the purpose of the valuation is only to determine whether the value of the interest is more or less than an arbitrary 5% *de minimis* figure.

Likewise, the use of gender-based tables does not promote equity and fairness. They do just the opposite because women are more likely to be taxed than men, simply because they are women. (A 17, A 34-35, A 45) That type of sex-based treatment clearly cannot be countenanced today.

In fact, the government, by re-adopting unisex tables in December, 1983, has acknowledged that the purported accuracy achieved by the use of sex-based tables is not an important govermental objective and that the use of sex-based tables does not promote equity and fairness. The government's brief in opposition does not explain the return to the use of unisex tables other than to suggest that it was done "on reconsideration in light of intervening developments...." (Brief in Opp. at 9, fn. 8.) The government does not tell us what those "intervening developments" are or what that "reconsideration" consisted of. Rather,

it hides, in a footnote, behind a mere statement that this is "a decision for the regulatory agency." Id. We cannot assume that the government has been unaware of the myriad of opinions of this court and courts throughout the country that have found gender-based discrimination unconstitutional. Moreover, it was only after the District Court decided this case that the government returned to unisex tables. Thus, the "intervening developments" must have included the cases that have found gender-based discrimination unlawful and/or unconstitutional.

In light of the above considerations, the government must be held to its burden of an "exceedingly persuasive justification" for the gender-based classification. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). The bare assertion by the government that accuracy is an important objective is not enough. In *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) and *Mississippi University*, 458 U.S. at 728, this Court held the mere statement of a benign purpose by the government does not justify a gender-based discrimination. Rather, a searching analysis must be made to determine the legitimacy of the government's purported objective:

> [W]e consistently have emphasized that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975). The same searching analysis must be made, regardless of whether the State's objective is to eliminate family controversy, *Reed v. Reed*, 404 U.S. 71 (1971), to achieve administrative efficiency, *Frontiero v. Richardson*, 411 U.S. 677 (1973), or to balance the burdens borne by males and females.

The constitutional requirement that the gender-based discrimination "serve important governmental objectives", therefore, has not been met. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

2. *The Requirement That The Gender-Based Discrimination Must Satisfy The Relationship Standard Has Not Been Met*

The government sidesteps the constitutional requirement that a gender-based classification "must be substantially related to achievement of" an important governmental objective (*Craig v. Boren*, *supra*, 429 U.S. at 197) and drifts into a discussion of whether the admitted discrimination is somehow invidious. (Brief in Opp. at 6-7.)

The objective of §2037 is to tax the privilege of *inter vivos* transfers. The 5% is an arbitrary figure to avoid the inclusion of the corpus when the interest is *de minimis*. The use of sex-based tables is not related to this objective. It does not make the taxation possible, or facilitate the taxation or make the taxation more fair. The use of gender-based tables does not reflect any difference between men and women that is relevant to the objective of taxation. The government, therefore, fails to show any relationship between the use of gender-based tables and the objective of the statute. (Even if accuracy were an important governmental objective, the use of gender-based tables is not substantially related to it because gender-based tables are inaccurate at least 80% of the time.)

3. *The Use of Gender-Based Tables Makes The Sterotypical Assumption That Women Do Not Work In The "Man's World"*

The government also attempts to assert that the gender-based discrimination here is not based on stereotyped or traditional assumptions. (Brief in Opp. at 7.) This is not so. The use of male/female tables perpetuates the traditional assumption that women do not work outside of the home, that women are not exposed to the pressures and vicissitudes of the workplace and that women do not engage in such "male customs" as smoking and drinking. (See Petition at 14-15 and materials cited there.)

The government quotes *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 469 (1981) (plurality opinion) that the Supreme Court has upheld statutes that "realistically reflects

the fact that sexes are not similarly situated in certain circumstances." (See Brief in Opp. at 6.) *Michael M.* has no relevance here. That case involved a statute that made it a criminal offense for a male to have intercourse with a girl under the age of eighteen. This Court upheld that statute because "young men and young women are not similarly situated with respect to the problems and risks of sexual intercourse." 450 U.S. at 471. The Court recognized the absolute biological difference between the sexes with respect to human reproduction. Clearly, the assumptions that go into the gender-based tables are not based on any such biological difference.

Finally, where there is no reason, as here, for the gender discrimination to exist, its invidiousness is clear.

4. *The Impact on Female Or Male Beneficiaries Is Irrelevant*

The government also argues that the Court of Appeals' finding of a "patchwork distribution of relative advantages and disadvantages" (A 15) was a correct basis for finding that the discrimination here is not unconstitutional. (Brief in Opp. at 7-8.) The estate tax statute at issue here is directed at decedents and it works to the detriment of female decedents solely because of their sex. The basic purpose of the federal estate tax is to tax the privilege of transferring property by testamentary disposition or *inter vivos* substitute. The statute, therefore, is not directed at beneficiaries and, in any event, any impact on such non-taxpayers "does not eliminate the valid complaint of all female settlors that their gender always results in a higher valuation of the reversionary interest than would occur if these settlors had been males." (Dissenting opinion of Judge Newman, A-37).

In addition, the Court of Appeals stated that this "patchwork distribution" did not put women under a greater aggregate tax burden. (A 15-A 16) The Court also inconsistently held, however, that "similarly situated men and women are treated differently in a way that may effect the taxpayer's ultimate tax burden." (A 8)

5. *The Use of Gender-Based Tables Is Not Compatible With Congressional Intent*

The government argues that the use of gender-based tables is compatible with Congress' intention that averages be used and again simply concludes that gender-based tables give more accurate averages. (Brief in Opp. at 8-9.) As already discussed, the use of male/females tables simply is not more accurate. Nobody disputes that Mrs. Wallace's true interest in the reversion is zero. Talk of a fictional interest based on male/female actuarial tables as being more accurate than a fictional interest based on unisex tables is absurd.

Furthermore, when Congress first enacted the statutory scheme, only unisex tables were used. Congress never authorized the IRS, nor could it, to use unconstitutional regulations to implement the legislation.

In fact, the Internal Revenue Service and the Courts have interpreted the statutory language to mean that the actuarial value is to be determined without regard to the particular facts that would normally be considered in valuing an interest dependent upon a life or lives. Rev. Rul. 66-307, 1966-2 C.B. 429; *Estate of Dwight B. Roy, Jr.*, 54 T.C. 1317 (1970); *Estate of Henrietta Allen v. United States*, 558 F.2d 14, 19 (Ct. Cl. 1977); *Robinson v. United States*, 454 F. Supp. 1160 (N.D. Cal. 1978), *aff'd*, 632 F.2d 822 (9th Cir. 1980). *Contra, Hall v. United States*, 353 F.2d 500 (7th Cir. 1965).

There is not a hint in the statute or the committee reports to suggest that Congress intended to authorize the Secretary to consider the particular fact of sex and no other particular fact, when determining "value" for purposes of the 5% test. Certainly, Congress ancitipated that the tables could be changed to reflect up-to-date mortality data and interest rates but there is no authority for differentiating between the sexes by the use of sex discriminating tables, rather than using the unisex table in existence at the time of the adoption of the 5% rule.

6. *The Government Ignores The Court Of Appeals' Holding That The Discrimination Must Be Intentional*

Significantly, the government ignores the Court of Appeals' holding that the discrimination must be intentional. (A-19) No such requirement exists (Petition at 22) and the government has recognized this by not even mentioning the Court of Appeals' holding on that issue.

7. *The Government's Argument On* Manhart *And* Norris *Is Unavailing*

The government argues that *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978) and *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983) are inapplicable here because the effects of the challenged practice in those cases were different from the effects here. (Brief in Opp. at 9-10.) In *Manhart* and *Norris*, according to the government, those who did not fit the statistical norm were discriminated against but, in this case, because the decedent has died, she does not fit the statistical norm whether gender-based or non-gender-based tables are used. The government argues, therefore, that in the present situation, there is "no adverse effect on non-conforming individuals similar to that involved in *Norris* and *Manhart*." (Brief in Opp. at 10, fn. 10.) In this case, however, the tables discriminate against those who fit the statistical norms because every women is more likely to be taxed. (A 27, A 29) The discriminatory impact, therefore, is quite clear.

In *Manhart* and *Norris*, furthermore, the justification for the challenged scheme was that contributions had to be sufficiently matched with benefits to insure the solvency of the annuity. Such a justification does not exist in the case of valuing a reversionary interest.

In any event, the government's argument undercuts its conclusion that accuracy is an important governmental objective. As the government acknowledges, "the decedent's actual life expectancy is entirely irrelevant." (Brief in Opp. at 10.) Using gender

to determine a purportedly more accurate actual life expectancy when such "actual life expectancy is entirely irrelevant" cannot be an important governmental objective.

8. *The Government, By Its Unilateral Action Of Adopting New Regulations, Cannot Undercut The Rights of Petitioner That Have Already Been Asserted In Pending Litigation*

Although the government claims that the issue presented lacks continuing importance, this is not so. (Brief in Opp. at 11.) When the government has acted unconstitutionally towards a taxpayer, it cannot mitigate that unconstitutionality by saying "we won't do it again" or avoid its duty to rectify the wrong done to the taxpayer where, as here, the taxpayer has continually asserted her rights and where litigation involving those rights was pending. The government's position apparently is that it has the unilateral right to determine the issues presented here by its readoption of unisex tables. Allowing the government to do so would be exceedingly unfair to petitioner. Furthermore, without review by this Court, there is nothing to prevent the government from using gender-based tables again. Important questions involving taxation based on gender have been presented, therefore, and those questions should be reviewed by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: New York, New York
March 14, 1986

Respectfully submitted,

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